No. 83-2004

IN THE

Supreme Court of the United States

October Term, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,

Petitioners

v.

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

This is a lengthy and complex antitrust case, still at the interlocutory, pretrial stage. It involves Sherman Act charges of unlawful combination and conspiracy by the Japanese television industry to restrain and monopolize trade and commerce in television receivers and other consumer electronic products in the American market. It also involves individual, as well as conspiracy, claims under the Antidumping Act of 1916. The Court of Appeals for the Third Circuit has rendered two interlocutory decisions that both aspects of this totally factual case should proceed to trial on the merits. Only the Sherman Act conspiracy issues are addressed in the petition, and the individual Antidumping Act issues must be tried in any event.

The Court of Appeals appendix in this case, which began more than thirteen years ago, consists of 18,780 pages in forty-one volumes. The district court's "Case Management Order," Pretrial Order No. 154 (478 F.Supp. at 946-960), required plaintiffs with preclusive effect to set forth in narrative fashion each "fact" and each "subsidiary fact" they intended to prove at trial, together with separate reference to each document, excerpt of testimony, and witness that would be relied on at trial to establish each such subsidiary fact. Plaintiffs set forth their case in chief in detail in a 17,000-page Final Pretrial Statement, in 1200 pages of experts' reports, and in thousands of pages of computer-generated price comparisons. Some 250,000 pages of exhibits and underlying data were placed in the record, and at least 206 witnesses gave depositions or affidavits, in addition to prior testimony given by a number of petitioners' officers in another proceeding. Based upon a fourteen-month study of the voluminous appendix, two full days of oral argument, and over 600 pages of briefs, the Court of Appeals below unanimously concluded "that as to most of the defendants the record discloses material issues of disputed fact which made entry of summary judgment [in their favor] improper." (45a). The questions arising out

of that judgment are essentially factual in nature, and may be restated as follows:

1. Whether this Court has either jurisdiction or discretion to review a related but separate judgment of the Third Circuit, involving the Antidumping Act of 1916, where the petition seeking review of the antitrust ruling raises no Questions Presented relative to the Antidumping Act decision.

2. Whether this Court should reassess the massive factual record to determine if the Third Circuit's inferences and conclusions are adequate under Rule 56 of the Federal Rules of Civil Procedure to support its unanimous decision that summary judgment was improper and that the case should be remanded for trial on the merits.

3. Whether the Third Circuit was correct in holding that summary judgment is improper in this case (a) where the Court of Appeals applied well-established principles of proof of antitrust conspiracy by the direct and circumstantial evidence, (b) where factual disputes are found as to such material issues as the alleged conspiracy and the purported "foreign sovereign compulsion" defense, and (c) where the record also contains uncontradicted expert opinion evidence that further establishes the existence of disputed issues.

4. Whether the Court of Appeals was correct in ruling admissible respondents' uncontradicted expert opinion evidence, based on data which the experts attested without contradiction was of a type reasonably relied upon by experts in their fields, and in considering such evidence together with other direct and circumstantial evidence in holding that summary judgment is improper in this case.

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DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Rule 28.1 of the Rules of the Court, Respondents submit the following statement: Zenith Radio Corporation has no parents or non-wholly-owned subsidiaries. National Union Electric Corporation is a wholly-owned subsidiary of Dometic, Incorporated, which in turn is a wholly-owned subsidiary of A.B. Electrolux. NUE has no non-wholly-owned subsidiaries.

COUNTER-STATEMENT OF THE CASE

In this litigation, which the court below described as "complex" (205a), two American television manufacturers, respondents Zenith Radio Corporation and National Union Electric Corporation, challenge an unlawful combination and conspiracy among twenty named co-conspirators comprising the principal Japanese television manufacturers doing business in the United States, their trading companies and their United States subsidiaries, and others, to restrain and monopolize trade and commerce in television receivers and other consumer electronic products in the United States. At an early stage in this litigation, after exhaustive discovery by deposition, interrogatories and document production, and on the basis of an extensive factual record refuting defendants' challenge to *in personam* jurisdiction, venue and service of process, all of these companies were held to be present in the United States and transacting business here and availing themselves of the protection of the laws of the United States. 402 F.Supp. 262 (E.D. Pa. 1975). The petition does not challenge those findings. Plaintiffs seek treble damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §15 and 26, for defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, Section 7 of the Clayton Act, 15 U.S.C. §18, Section 2(a) of the Clayton Act, 15 U.S.C §13(a), Section 73 of the Wilson Tariff Act, 15 U.S.C. §8, and the Antidumping Act of 1916, 15 U.S.C. §72.

The Court of Appeals for the Third Circuit on December 5, 1983, unanimously vacated summary judgments for the petitioners in this litigation and remanded this case for trial. On appeal from summary judgments entered by the district court, a panel of the Court of Appeals, comprised of Chief Judge Collins J. Seitz, Circuit Judge John J. Gibbons, and Circuit Judge Thomas J. Meskill (of the Second Circuit, sitting by designation), ruled unanimously that plaintiffs' admissible direct and circumstantial evidence

was sufficient to overcome defendants' motions for summary judgment and to require a trial. The Court also unanimously reversed many of the district court's pretrial evidentiary rulings, reversed the summary judgments on the antitrust claims, and remanded the case to the district court for trial. (34a-197a).

In a second opinion, arising out of an earlier interlocutory appeal from the district court's decision granting defendants partial summary judgment based on the statutory construction of the Antidumping Act of 1916, 15 U.S.C. §72, the same panel unanimously rejected the district court's construction of the Antidumping Act of 1916, upheld the sufficiency of respondents' evidence of petitioners' violation of that statute, and reinstated all of plaintiffs' claims under the Antidumping Act of 1916. (198a-223a).

The Court denied the petitions for rehearing. (235a).

These rulings followed thirteen years of pretrial proceedings in which the Japanese defendants have delayed in providing pricing information and other discovery and have filed a battery of dilatory pretrial motions, including, among others: (1) motions challenging *in personam* jurisdiction, venue, and service of process, 402 F.Supp. 262 (E.D. Pa. 1975); (2) motions to strike certain paragraphs from the NUE and Zenith complaints (Orders dated February 13 and 20, 1975); (3) motions attacking the constitutionality of the Antidumping Act of 1916 on grounds of asserted "vagueness", 402 F.Supp. 251 (E.D. Pa. 1975); (4) a motion challenging subject matter jurisdiction of the court, 494 F.Supp. 1161 (E.D. Pa. 1980); (5) a motion challenging Zenith's standing to sue, 494 F.Supp. 1246 (E.D. Pa. 1980) (*Illinois Brick* doctrine); (6) a motion challenging NUE's standing to sue, 498 F.Supp. 991 (E.D. Pa. 1980) (*Bangor Punta* doctrine); (7) a motion challenging application to their United States subsidiaries of the Antidumping Act of 1916 on grounds of alleged repugnance to the United States-Japan Treaty of Friendship, Commerce and Navigation, 494 F.Supp. 1263 (E.D. Pa. 1980); (8) motions challenging plaintiffs' right to trial by jury on grounds of alleged "complexity", 478 F.Supp. 889 (E.D. Pa. 1979), *vacated on interlocutory appeal*, 631 F.2d 1069 (3d Cir. 1980); (9) objections to transfer pursuant to 28 U.S.C. §1404(a) and consolidation of the NUE action (Order dated August 18, 1976, E.D. Pa. 1976); (10) motions seeking pretrial summary judgment based on asserted inapplicability of Antidumping Act of 1916, 494 F.Supp. 1190 (E.D. Pa. 1980), *rev'd in part, aff'd in part*, 723 F.2d 319 (3d Cir. 1983) (198a-223a); (11) motions and objections resisting discovery in this case of their submissions to the United States Treasury Department during administrative proceedings under the Antidumping Act of 1921 in *Television Receivers, Monochrome and Color, From Japan*, TD. 71-76 (Pretrial Order No. 9 dated February 19, 1975); (12) motions for pretrial summary judgment based on the statute of limitations (Orders of February 20, 1975, December 9, 1976); (13) multiple motions for summary judgment on distinct issues under §1 of the Sherman Act, §2 of the Sherman Act, §2(a) of the Clayton Act, as amended, §7 of the Clayton Act, and §73 of the Wilson Tariff Act; (14) two mandamus proceedings and one interlocutory appeal pursuant to 28 U.S.C. §1292(b); (15) *in limine* pretrial motions raising a panoply of evidentiary objections to plaintiffs' proof principally under Rules 104, 403, 702-704, 801-805, 901-902 of the Federal Rules of Evidence; and (16) petitioners' present application to this Court, which may consume nearly one more year, by reason of petitioners' motion for extension of time to file their petition for rehearing below, their application for a 90-day stay of the Court of Appeals' mandate, and their action in maneuvering the filing of their petition for a writ of certiorari to shortly before this Court's summer recess.

Defendants' delaying tactics also included their filing, in December 1976 — *two years after they filed their answers to Zenith's complaint* — of belated, frivolous counterclaims against Zenith seeking in excess of $1.2 billion in

alleged damages based on the allegation that Zenith's efforts to vindicate its legal rights constituted so-called "sham litigation" and were actionable under the Sherman Act. Defendants subsequently utilized these belated counterclaims as the vehicle for delaying trial still further and for harassing Zenith's customers in a nationwide deposition program involving defendants' depositions of forty-nine persons from thirty-two companies — a three-year discovery campaign that generated an additional 10,093 pages of transcripts, 2,851 pages of exhibits, and the production of tens of thousands of other subpoenaed documents by non-parties to the litigation.

Consideration of the Japanese manufacturers' unmeritorious summary judgment motions, and their equally unmeritorious pretrial evidentiary objections, has already consumed over five years. It has generated more than one hundred twenty-five briefs, seven opinions totalling over 1,200 printed pages in petitioners' appendix in this Court, over twenty thousand pages of appendices in the Court of Appeals, and numerous related motions, replies, and other papers. All of this time, expense and judicial effort has been invested solely in order to save these defendants the trouble of addressing the merits of this case at a trial. Petitioners are now attempting to further delay a trial by seeking review of these determinations, which as petitioners even concede are purely "interlocutory." (Pet. at 8).[1]

Petitioners informed the Court of Appeals in a prior interlocutory appeal, in which they contended that this case was too "complex" to be tried to a jury, that this case

1. References to the Petition for Certiorari are abbreviated 'Pet.' Page references to the Appendix To Petition for A Writ of Certiorari are given in the form '____a' with the page number preceding. Page references to the Joint Appendix in the Court of Appeals are given in the form '____A' with the page number preceding. Emphasis is supplied throughout unless otherwise noted.

involves "an avalanche of complex evidentiary materials."[2]

Nonetheless, petitioners' counsel told the court below that appellate review in this case required the arduous examination of this detailed factual record:

> MR. MILLSTEIN: The fact is that whether you like it or not, *you have to look at the record. That's what the case is all about* and the Rule 56 argument I am just going to go right past. Unfortunately, Rule 56 does not bar your looking at the record. *You are going to have to look at that record, Your Honor. We took months doing it and the lower Court took months doing it. I don't know how this court has the time to do it.* But unfortunately, as I read the authorities, you have got the same burden as the District Court, if you want to reverse something.[3]

The Court of Appeals devoted fourteen months to the task. Petitioners are now asking this Court to sift through this forty-one volume record of 16,780 pages again to reassess the same factual questions which the unanimous court below resolved against them. It would be inappropriate and unnecessary for this Court to review those factual issues, which are of importance only in this particular case. See *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1925). That is especially true here, where no trial record has yet been made, because the ruling below is purely interlocutory.

The fundamental issue below in the antitrust segment of this case was conspiracy. A summary of the facts becomes important because petitioners have deliberately

2. Brief of Appellants, dated December 3, 1979, in No. 79-2540, United States Court of Appeals for the Third Circuit, at 8.

3. Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 12, 1982, at 97-98.

omitted any statement of the facts in their petition. As a principal means of achieving the object of their conspiracy, the Japanese manufacturers and their affiliates secretly conspired to drive down price levels for these products in the United States by establishing and maintaining low, dumping price levels for their massive imports of television receivers and other consumer electronic products imported and sold within the United States, and, to simultaneously establish and maintain high price levels in the Japanese market, which during the relevant time period remained closed to competition from imports of the products of United States manufacturers, of other foreign manufacturers, and even of defendants' products manufactured at their lower labor-cost Taiwanese and Korean factories whose production was devoted to the United States. The purpose and effect of this predatory international trade practice — known as "dumping" and illustrated in this record in its collusive form — was to drive United States manufacturers out of business by depressing prevailing United States prices to unprofitable levels until dwindling revenues or financial losses caused United States manufacturers to abandon the business, as in the case of National Union Electric Corporation's Emerson Division, or to become seriously weakened and attractive targets for acquisition at distress prices by defendants and their co-conspirators.

The conspiracy was formed and implemented in a single continuous course of conduct in the United States and Japan which involved secret meetings among some of the highest officers of these foreign corporations in hotel rooms, trade and export association offices and in meetings with large United States importers of these products. Petitioners secretly fixed and maintained prices in Japan that were more than 50% higher than the prices they jointly established for the same products imported and sold in the United States. They lied to the Government of Japan concerning their actual United States import prices. To conceal and continue their dumping campaign, these corporations also gave their cooperative adherence to a system of concealing their actual United States import prices. They entered hundreds of millions of dollars of consumer electronic products through United States customs on entry documents and invoices on which they reported falsely inflated import prices, and to conceal the actual dumping prices, they and their confederates paid extra duty, risked criminal prosecution, risked forfeiture of the shipments and furtively refunded importers' deliberate overpayments through Swiss and Hong Kong bank accounts, secret international telegraphic fund transfers, travellers' checks and other clandestine channels and means. They lied to the United States Treasury Department in the ensuing administrative antidumping investigation by reporting falsely inflated prices as the actual prices. The Fair Trade Commission of Japan has on three separate occasions invoked the Japanese antimonopoly laws against these companies, and criminal proceedings and customs fraud investigations and antidumping investigations in the United States have followed in the wake of defendants' well-planned and well-executed assault on the United States consumer electronics industry.

As a result of these practices, the absolute volume of imports and the combined share of United States sales represented by the Japanese defendants' consumer electronic products increased many-fold. Plaintiffs' computer-generated, model-by-model price comparisons of petitioners' Japanese and United States models disclose mean percentage margins between Japanese factory sales prices and the factory sales prices of television receivers imported into the United States of 59.22% (average for Hitachi, Matsushita, Mitsubishi, Sanyo, Sharp and Toshiba) for color television receivers and 58.48% (average for same) for monochrome receivers. (1958A-59A; 2485A-86A). Retail "price points" of television receivers and other consumer electronic products in the United States market declined sharply. (4269A-98A; 4304A-4530A). As a result of petitioners' practices, United States

production and United States producers' aggregate share of domestic sales plummeted. (2486A-88A). The number of companies producing television receivers in the United States declined. Underutilization and idling of United States television receiver assembly plants resulted. (1960A; 2491A-93A). United States producers suffered a decline in operating profits. (1968A-69A). The average number of persons employed in United States establishments in this industry and man-hours worked on television receivers declined. (1960A-64A). Elaborate studies of the industry done by federal agencies having special expertise in analyzing the effects of imports on domestic commerce describe in detail the injury which United States manufacturers sustained. (4191A-4208A). Economic studies prepared by plaintiffs' expert economic witnesses, verified by affidavit, corroborate the Government's findings. (App. Vols. 5 and 6, and 3107A-13A). The operating results of other domestic manufacturers that survived reflect these effects. (4211A-31A; 4237A-4268A; 1918A-1980A; 2475A-2517A; 4119A-4530A). Many established television manufacturers with profitable operations in other fields of business did not survive.

On December 4, 1970, the United States Department of the Treasury found that ". . . television receiving sets . . . from Japan are being . . . sold at less than fair value . . ." because ". . . exporter's sales prices were lower than home market prices by amounts that were more than minimal . . ." (4190A). The Tariff Commission's unanimous finding in 1971 was that the United States television industry ". . . is being injured by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended." (4191A-4199A).

REASONS FOR DENYING THE PETITION

Petitioners present three questions for interlocutory review. None of them warrants review by this Court. They involve only narrow, interlocutory evidentiary rulings and factual determinations that are of significance only in this case. Accordingly, the petition should be denied.

The Petition on its face presents a serious, threshold question of jurisdiction that arises from petitioners' less than candid Statement of the Questions Presented. Not one of those questions fairly includes the question of the sufficiency of respondents' showing of the element of specific intent under the Antidumping Act of 1916. As stated, petitioners' Questions Presented embrace only issues in the "antitrust conspiracy case". The Court of Appeals' decisions on December 5, 1983, however, resulted in *two* judgments (224a-228a and 229a-233a), one involving only the claims under the Antidumping Act of 1916, 15 U.S.C. §72, and the other involving petitioners' evidentiary objections and the propriety of summary judgment on the antitrust conspiracy issue. Yet in the body of their Petition (Pet. at 8) and again in the conclusion (Pet. at 28, in the reference to *two* "judgments"), petitioners attempt, without further explanation, to smuggle into these proceedings issues involving the Antidumping Act of 1916 claims.[4] Petitioners thus attempt to expand the review sought beyond the issues identified in the Questions Presented.

This procedure is improper and violates Rule 21.1 of this Court, which provides that "[o]nly the questions set

4. Thus, petitioners state (Pet. at 8):

> Finally, in a separate opinion handed down on the same day, the panel also reversed the District Court's dismissal of respondents' claims under the Antidumping Act of 1916. Applying its unprecedented standard for inferring a conspiracy to the 1916 Act, the panel held that respondents had established a *prima facie* case of concerted action that would satisfy the specific predatory intent requirement of that Act. (219a-221a). *If this Court reverses the antitrust judgment of the Court of Appeals it would thus necessarily reverse the Antidumping Act judgment as well.*

forth in the petition or fairly included therein will be considered by the Court." For this reason, respondents do not address the separate issues involving the 1916 Antidumping Act judgment. Moreover, since the individual Antidumping Act claims against each defendant must therefore proceed to trial, piecemeal interlocutory review by this Court of the sufficiency of proof of the antitrust conspiracy claims at this stage would be particularly inappropriate.

Furthermore, the Court of Appeals — unanimously reversing most of the trial court's *thirteen* basic *in limine* rulings on evidentiary matters — determined that the pretrial record, correctly viewed for summary judgment purposes, would present a *prima facie* case at trial, and, thus, presented factual issues under Rule 56(e) preventing the grant of judgment. Petitioners never explain what purpose would be served by review by this Court of less than all the interlocutory evidentiary rulings of the court below — rulings that redefined the summary judgment record with respect to the antitrust conspiracy claims. There is no demand for any specific relief. Certainly, this Court could not reinstate the trial court's grant of Rule 56 judgments on the antitrust conspiracy claims, as petitioners concede that the trial court's judgments rested upon an improper definition of the summary judgment record.

These reasons alone warrant denial of the petition.

I. REVIEW OF THE INTERLOCUTORY ORDER BELOW REVERSING SUMMARY JUDGMENT IN THIS PRIVATE ANTITRUST ACTION WOULD INVOLVE ONLY REASSESSMENT OF THE SUFFICIENCY OF A MASSIVE FACTUAL RECORD AND WOULD BE INAPPROPRIATE

Petitioners are now asking this Court to reassess the forty-one volume record of 18,780 pages and rule again on the same factual questions which a unanimous Court below has resolved against them. There is no need for this Court to review the factual issues again. The facts and inferences

reviewed by the Court of Appeals involved voluminous evidence of petitioners' conspiracy in one of the unusual antitrust conspiracy cases in which there is *direct*, as well as circumstantial evidence. However, in an effort to manufacture an "issue" that the decision below does not genuinely present, petitioners have seriously misstated the holding of the Court of Appeals, and they have misstated the nature of the evidence in this record, by repeatedly mischaracterizing this case as one involving only evidence of "parallel acts and other circumstantial evidence." (Pet. at i, 5, 6, 7, 9, 10).

This premise of the petition is wrong.

The Court of Appeals repeatedly emphasized that the summary judgment record contains *direct evidence* of the conspiracy that respondents allege.[5] Moreover, it is precisely because in this case there is such direct evidence of petitioners' concert of action that the Court of Appeals distinguished other precedents that involve only circumstantial evidence of conscious parallelism as *not* "dispositive" in this case. (165a). The Court recognized that "[u]nlike most of those [cited] cases . . ., this case presents a record in which there is *both direct evidence* of certain kinds of concert of action *and circumstantial evidence* having some tendency to suggest that other kinds of concert of action may have occurred." The Court of Appeals correctly concluded that "none of those conscious parallelism cases can be dispositive on the propriety of summary judgment". (164a-165a). Because of the length of the 1214-page appendix accompanying the Petition, the pertinent portion of the Court of Appeals' opinion is set forth at greater length for the convenience of the Court (164a-165a):

5. The Court specifically referred to respondents' "*direct evidence*" at least seven times in its opinion: at 165a; 166a; 172a; 173a; 174a; and 176a. The Court said that "[h]ere, *direct evidence* and circumstantial evidence may validly be considered to cumulate and reinforce with respect to the ultimate facts in issue." (165a).

Cases in which, as under section 1 of the Sherman Act and section 73 of the Wilson Tariff Act, liability depends upon the existence of a conspiracy usually will require determining the permissible limits of inferences which may be drawn from circumstantial evidence. . . . There are, however, limits beyond which reasonable inference-drawing degenerates into groundless speculation, limits having due process aspects. Those limits are defined in each case by the laws of logic, which inform the court whether there is a reasonable probability that the asserted conclusion follows from the proven facts. It is not surprising therefore that the courts have had frequent occasion to address the minimum quantum of circumstantial evidence sufficient to support an inference of conspiracy.

This court has in a series of cases dealt with the problem of discerning those limits. The context in which that problem has been most frequently presented is in cases in which the court has been asked to draw an inference of concert of action from the circumstantial evidence of conscious parallel conduct by the defendants. . . . While conscious parallel conduct has some tendency suggestive of concert of action, the tendency is so slight that we have held that circumstance, standing alone, to be legally insufficient. [citations omitted] These cases are merely illustrations of the more general proposition that there are legal limitations upon the inferences which may be drawn from circumstantial evidence, which must be determined in light of the ultimate fact in issue and the totality of relevant circumstantial evidence having any tendency to make the existence of that fact more probable.

When there is direct evidence of concert of action — a written agreement, or a memorandum of what transpired at a meeting, for example — the legal problem facing a court is different. Then it is not faced with the limitations of the inference-drawing process, for such direct evidence "tends to show the existence of a fact in question [concert of action], without the intervention of the proof of any other fact. . . ." Black's Law Dictionary 414 (5th ed. 1979). Rather, the court must simply determine whether, if the fact-finder were to credit the direct evidence of the fact in issue, the existence of that fact would have the legal significance urged by the proponent of the credited evidence. Would direct evidence of a horizontal agreement to fix resale prices in Japan, for example, have any legal significance in this action? *Unlike most of the cases referred to in the preceding paragraph, this case presents a record in which there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred. Thus, none of those conscious parallelism cases can be dispositive on the propriety of summary judgment in this case.* [Footnote 55 omitted]

The Court of Appeals simply gave effect to the direct evidence in the record, as well as the circumstantial evidence. It did not fashion any new "exception" or "new rule of law."

Petitioners raise the spectre that the Third Circuit's opinion involves a significant departure from existing law, asserting that the Court of Appeals employed a rule which permits an inference of conspiracy from circumstantial evidence that was equally or more probative of competition among the Japanese manufacturers than of collusion. They are wrong. They have failed to point to a single passage in which the Court articulated any such standard. The Court of Appeals *nowhere* states such a principle in its opinion. The Court of Appeals also does not state, acknowledge, or so much as imply that it was announcing *any* "new rule" concerning proof of conspiracy.

The Court which heard this appeal was well-acquainted with the legal precepts in this area,[6] and could recognize what is, or is not, a departure from settled principles, and could identify an "unprecedented exception" or "a new rule of law," as petitioners claim (Pet. at 11), had its decision actually involved such a "departure". But the Court did not. Petitioners, for their own purposes, are simply attempting to manufacture an "issue" from what the Court of Appeals *did not say*. They do not present a question that genuinely arises in this case.

The Court of Appeals has not rewritten the standard for summary judgment in antitrust conspiracy cases. Nor has it in appropriate instances hesitated to terminate unmeritorious antitrust conspiracy cases by summary judgment or directed verdicts.[7] This simply was not such a case. The Court of Appeals specifically "*approved for protracted cases*" the district judge's innovative interpretation of F.R.Civ.P. 56, which was designed to streamline consideration of summary judgment motions in these cases. (60a-64a). Under this interpretation of Rule 56, the trial court may require the plaintiff prior to trial to set forth its

6. Chief Judge Seitz authored the Third Circuit decisions in the leading antitrust conspiracy decisions of *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), and *Venzie Corp. v. U.S. Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975). Judge Gibbons authored the decision in *Schoenkopf v. Brown & Williamson Tobacco Co.*, 637 F.2d 205 (3d Cir. 1980).

7. *See, e.g., Tose v. First Pennsylvania Bank*, 648 F.2d 879 (3d Cir. 1981), *cert denied*, 454 U.S. 893 (1981) (affirming directed verdict for defendants); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205 (3d Cir. 1980) (affirming directed verdict for defendant); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (affirming directed verdict for defendant); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975) (affirming judgment n.o.v. for defendants); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961) (affirming directed verdict for defendants).

entire case in a comprehensive Final Pretrial Statement, *with preclusive effect*, and may address the sufficiency of that evidence on summary judgment motions filed by defendants which are unsupported by any detailed factual showing by affidavit or otherwise.[8] Far from "undermining" the utility of summary judgment in complex cases, as petitioners incorrectly assert (Pet. at 17), the Court of Appeals reaffirmed this use of summary judgment as an effective weapon for terminating unmeritorious claims in protracted cases by shifting to the plaintiff the initial burden to come forward with sufficient evidence. Here, however, plaintiffs' evidence satisfied even this more stringent standard. *Compare, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970) ("[n]o defense to an insufficient showing is required").

A. *There Is No "Conflict" Among The Circuit Courts.*

The cases that petitioners allege "conflict" with the Third Circuit's decision in this case are readily distinguishable. In each of those cases, the *only* evidence of conspiracy was circumstantial.

In *Proctor v. State Farm Mut. Auto Ins. Co.*, 675 F.2d 308 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982), the majority upheld summary judgment in defendants' favor, specifically stating that "[a]ppellants have *pointed to no direct evidence* to support their allegations that appellees met and agreed to establish a uniform labor rate or otherwise to fix the price of automobile body repair work." 675 F.2d at 334. In *Weit v. Continental Illinois National Bank and Trust Co. of Chicago*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), the majority of the divided Seventh Circuit panel stated: "Our review of the record leads us to the conclusion that *the circumstantial*

8. Here, for example, the four Sanyo defendants, the two Toshiba defendants, and the three Hitachi defendants (the latter with one narrow exception) filed *no affidavits at all* to support their summary judgment motions.

evidence in support of the complaint is so insubstantial when measured against the evidence in support of defendants' denials as to preclude a verdict for plaintiffs." 641 F.2d at 466.

The holdings in *Weit* and *Proctor* stand in stark contrast to the Third Circuit's decision in this case, which rests firmly on undisputed direct evidence of petitioners' concerted action.[9]

It is not surprising, therefore, that petitioners in their briefs in the Court of Appeals never even *cited Weit* or *Proctor* to support their position.

B. *There Is No "Conflict" With This Court's Decisions in Cities Service and Monsanto.*

Petitioners' strained effort to place the Third Circuit's decision in "conflict" with this Court's decision in *First National Bank of Arizona v. Cities Service*, 391 U.S. 253 (1968), is also without merit. There, plaintiff adduced evidence only of defendants' simple failure to deal with plaintiff. Although plaintiff pointed to "other evidence" to support the inference of a conspiracy, *all* of that evidence was likewise *circumstantial*.[10] Contrary to petitioners'

9. The two other cases petitioners cite in Footnote 10 of their Petition are distinguishable on the same ground. In *Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102 (2d Cir. 1975), the Court had before it only circumstantial evidence. In *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 884 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1777 (1983), the Court explicitly stated that "*appellants presented no direct evidence of conspiracy.*"

10. Petitioners' far-fetched suggestion that the record in *Cities Service* also contained "direct evidence" of conspiracy (Pet. at 12) is a remarkable misrepresentation of the facts of that case. Examination of the Court's opinion at the pages petitioners cite, 391 U.S. at 263-64, 276, 283-85, 286-87, will show that plaintiff in *Cities Service* adduced no direct evidence and that the Court did not characterize any of the evidence as "direct evidence," notwithstanding petitioners' use of quotation marks.

suggestion, none of it was *direct* evidence. The Court twice emphasized that the only evidence was circumstantial, first in pointing specifically to "*the one fact that he has produced*, Cities' failure to make a deal with him for Iranian Oil", 391 U.S. at 286, and again in stating that "*the only evidence*" of participation in a conspiracy was the plaintiff's "allegation that the failure to deal resulted from conspiracy." 391 U.S. at 289. The refusal to deal, without more, was insufficient.[11]

By contrast, once again, the Court of Appeals in this case explained that "*[h]ere direct evidence and circumstantial evidence may validly be considered to cumulate and reinforce with respect to the ultimate facts in issue.*" (165a-166a).

Nor does the teaching of *Monsanto Corp. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984), "conflict" with the Third Circuit's decision in this case. In that case, the Court upheld a jury's finding of conspiracy because "there was substantial *direct* evidence of agreements to maintain prices". 104 S.Ct. at 1471. The Court reaffirmed that "[e]vidence of this kind plainly is relevant and persuasive as to a meeting of minds." Indeed, in formulating the applicable standard (104 S.Ct. at 1471), this Court quoted with approval Judge Aldisert's opinion for the Third Circuit in *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980), and thereafter adopted the quoted passage verbatim as the definitive standard. 104 S.Ct. at 1473. The Third Circuit's decision in this case does not conflict with Judge Aldisert's statement of the correct standard in *Edward J. Sweeney & Sons*.

Petitioners also repeatedly suggest that, although direct evidence exists of petitioners' concert of action, it is not direct evidence of "the conspiracy alleged." (Pet. at 6,

11. The Court's discussion in *Cities Service* of *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), and *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), points to the same conclusion. There was no direct evidence in either of those cases.

10, 11, 13). Petitioners are plainly incorrect, and their technique of fragmenting the evidence is precisely what this Court cautioned against in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), where it said: "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' " Respondents alleged a *single* conspiracy to maintain and stabilize high television receiver prices in Japan and to establish and maintain low, dumping level prices in the United States. The resultant international price structure, which *direct* evidence shows that the defendants collusively established, is the concerted predatory dumping system that injured Zenith and put NUE out of business. One aspect of that alleged conspiracy involved the setting of high prices in Japan. "Considerable direct evidence" of this exists, as the Court below found. (172a-173a). Indeed, counsel for petitioners acknowledged the uncontradicted direct evidence of these price-fixing agreements during oral argument in the Court of Appeals, a concession the Court of Appeals duly noted in its opinion. (174a).[12] Circumstantial and direct evidence of other aspects of the arrangement also exist.

Petitioners also seriously misstate the Court of Appeals' holding in this case when they suggest that the Court adopted a rule for inferring conspiracy from circumstantial evidence alone ("parallel acts and other cir-

12. Although petitioners attempt (Pet. at 13) to limit the time period of these agreements to only a "two-year period," the Court of Appeals specifically rejected petitioners' arguments and pointed to the abundant record evidence that supports the reasonable inference that these agreements "operated over a longer period". (174a).

cumstantial evidence," as petitioners persistently mischaracterize it) without considering whether the actions of the co-conspirators were consistent with competition or with collusion, or whether such acts were contrary to each company's economic self-interest. The abundant direct and circumstantial evidence in this record of petitioners' admitted concert of action (174a) showed petitioners' course of conduct was totally *inconsistent* with any "inference" of "competition." Moreover, the Court of Appeals in this case *affirmed* summary judgment as to Sears, Roebuck & Co., Motorola, Inc. and the two Sony defendants. The majority of the Court found no direct evidence connecting those defendants, and held the circumstantial evidence of conspiracy insufficient, *i.e.* insufficient to show a course of conduct contrary to economic self-interest, or more consistent with collusion than with competition, or, in the case of the Sony defendants, insufficient to establish motive. (181a; 182a; 185a). Far from ignoring such factors, the Third Circuit took specific account of them. The fact that the Court could not affirm summary judgment as to the twenty other defendants means only that the combination of direct and circumstantial evidence implicating those defendants was sufficient — not that the Court applied some unspoken "new rule" or silently created some novel "exception".

Although the Court of Appeals found it unnecessary to place exclusive reliance on such evidence, there was abundant evidence with respect to petitioners of conduct contrary to petitioners' individual economic self-interest and abundant evidence of motive. For example, petitioners' conduct at their Television Export Council and the Television Export Examination Committee in knowingly participating in a common scheme to conceal their actual dumping-level prices from the Japanese Government contradicted their independent economic self-interest to compete with each other and prevent one another from obtaining an illicit competitive edge in pricing. Their joint

concealment of their actual prices from U.S. Customs in the course of importation of these products into the United States also involved a continuous course of cooperative conduct that would have been contrary to their independent economic self-interest in the same way. None of these defendants ever reported one another to U.S. customs authorities for importing at *actual* prices lower than the false prices petitioners reported on their United States customs invoices and customs entry documents.[13] The conduct of Japanese manufacturers, the trading companies and their United States subsidiaries in jointly shielding the false invoicing scheme and dumping campaign from detection during the Treasury Department's Antidumping Act of 1921 investigation again required close cooperation to achieve their common purpose in continuing the dumping. The Japanese manufacturers' uniform practice of exporting the output of their Korean and Taiwanese factories across the Pacific Ocean to the United States, rather than selling part of that lower labor-cost output in the Japanese market in an effort to capture from one another additional market share in Japan, provides further circumstantial corroboration of interdependence, collusion and action contrary to individual economic self-interest. Again, petitioners' false reporting of "phantom" check prices after the non-renewal of the formal cartel agreements, the Manufacturers' Agreements and JMEA Rules in 1973, was interdependent

13. In fact, they discussed ways of jointly continuing to conceal these practices. At one meeting of representatives of the Japanese manufacturers and large importers on October 26, 1970, Matsushita's attorney, Mr. Millstein, proposed the filing of a lawsuit against the U.S. Treasury Department and "defended the notion that a litigation might provide protection against 'double pricing' exposure," reasoning that if the importers could win a determination of no dumping, "the government would be in a poor position to press double pricing charges" because it might seem to be "harassment" — the importer's representative noting, however, that the "weakness in the . . . logic lies in the premise of winning a determination of an absence of dumping." (6338A).

conduct that would otherwise have been contrary to defendants' individual economic self-interest because it required them to (i) pay extra Japanese taxes (on falsely reported higher prices), (ii) risk criminal prosecution for customs fraud, and (iii) risk forfeiture of the goods entered on false invoices. Success of the scheme required uniform adherence by all. These severe risks would have been irrational to assume unless petitioners knew that all others would give their adherence to it and that the benefit from doing it — preventing detection — would thereby be realized. These defendants had to admonish their customers to continue to open their letters of credit at prices higher than the actual negotiated prices and to forego interest on large sums the customers overpaid to conceal the actual prices. They had to incur additional administrative expenses to maintain double sets of accounts to track the millions of dollars of overpayments, and to transmit the overpayment funds back to the U.S. importers through clandestine channels, such as Swiss and Hong Kong bank accounts, travellers' checks, and international telegraphic transfers. They had to create additional documentation to disguise these payments as facially legitimate charges for non-existent "excessive inspection" or "rework" or other fictitious "commissions" and "services".

Petitioners' motives to participate in the conspiracy were also explained with clarity in the reports filed by plaintiffs' expert economic witnesses.[14]

14. For example, Dr. DePodwin explained how by acting together and exchanging statistics, the defendants were able to entrench their position in the United States market to a degree that individual action by them would never have achieved (1619A; 1628A). In addition, the Nehmer Report ("Economic Analysis of Evidence Relating to Japanese Electronic Products Antitrust Litigation," 2257A) explained how by conspiring, the Japanese companies were able to charge higher prices and earn greater profits in the Japanese market and lower their prices in the United States market to a level sufficient to reduce or eliminate U.S. competition, while maintaining an acceptable rate of return overall. *(Id.)*.

Review by this Court of the 41-volume, 18,780 page factual record in this case would involve nothing but another review of facts and is unnecessary and inappropriate.

II. THE COURT OF APPEALS' PRETRIAL RULING THAT UNRESOLVED FACTUAL ISSUES PRECLUDE SUMMARY JUDGMENT WITH RESPECT TO PETITIONERS' PURPORTED DEFENSE OF "SOVEREIGN COMPULSION" DOES NOT WARRANT INTERLOCUTORY REVIEW BY THIS COURT

No issue relating to petitioners' claimed "sovereign compulsion defense" is properly before the Court. As petitioners even point out (Pet. 5-6), the district court expressly refrained from deciding any of the many legal and factual questions surrounding their alleged "sovereign compulsion defense" in this case, which is predicated on a note that three third-echelon employees of the Japanese Ministry of International Trade and Industry ("MITI") caused to be sent to the clerk of the district court in 1975, relating to conduct that occurred between ten and twenty years ago. (393a-394a). The Court of Appeals also found it unnecessary to reach the question of the effect, if any, to be given to this document. (188a-189a).

Petitioners deliberately chose not to raise the false issue of their alleged "sovereign compulsion defense" in the Court of Appeals. At oral argument in the Court below, petitioners' liaison counsel made it clear that defendants "[did] not press it on this appeal":

> [Plaintiffs' counsel] points to these check price agreements about which I think your Honors know very well, we like to refer to them as government mandated export agreements because of the record that has been developed down below about MITI [the Ministry of] [I]nternational [T]rade and [I]ndustry having required it *but whether they did or not is obviously of no importance on this appeal and we do not press it on this appeal* because the fact is that the

> plaintiffs cannot show they were in any respect injured . . . ."[15]

Neither petitioners nor respondents raised this issue below in the questions presented in their briefs.[16]

It is well-established that this Court will not grant certiorari to decide in the first instance an issue which has not been decided by the lower courts, and which was not pressed. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-363 (1958). No satisfactory reason exists here to depart from that principle.

Petitioners quibble with the language of the Court of Appeals' opinion in describing the formal cartel agreements as "sponsored," "encouraged," or "mandated" and suggest that the Court of Appeals "found that a fact-finder could conclude that these arrangements were, in fact, not mandated." (Pet. at 20). The court below said no such thing. In describing the agreements, the court said: "the minimum price agreements appear to have been encouraged, *if not mandated by MITI*." (178a). The court's disposition simply made it unnecessary for it even to consider whether a fact-finder could conclude that these arrangements were, or were not, "mandated."

To be sure, defendants' "sovereign compulsion defense" based on this note is a false issue for many other reasons. Significant portions of the evidence of petitioners'

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15. Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 22, 1982, at 88-89.

16. Petitioners relegated mention of their contention in the district court regarding this note to passing mention in a *footnote* in their Joint Brief in the Court of Appeals, Joint Brief of Appellees, in Nos. 81-2331/2332/2333, at 44 n.34, and to a reference in the separate brief of Mitsubishi Electric Corporation ("MELCO") in the context of a discussion of MELCO's unmeritorious objection to subject matter jurisdiction. (MELCO Brief at 10-11).

conduct were not dealt with in the note and therefore all these issues must await trial. MITI did not direct petitioners to fix prices in Japan, to dump, to commit customs fraud by filing false U.S. Customs invoices, to lie about their prices to the U.S. Treasury Department in the 1921 Antidumping Act proceedings, to lie to MITI about their true prices, to collude with one another to continue to conceal their prices and to continue their dumping campaign, or to transform aspects of their export arrangements into an industrial bludgeon to be jointly wielded in the United States. The note itself describes an unwritten "direction" of uncertain content and scope by persons unknown on a date or dates unknown to persons unknown at places unknown with legal effect, if any, unspecified. Defendants' *non-compliance* with the "direction", however, is undisputed. Moreover, the course of conduct involved did not occur wholly within the territorial boundaries of Japan, since, as Judge Higginbotham found early in this case, the defendants are here in the United States, transacting business and availing themselves of the protection of United States law in the conduct of their business. 402 F.Supp. 262 (E.D. Pa. 1975); *see Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Petitioners' unconditional ability to withdraw from the formal cartel arrangements,[17] a right protected by Japanese statute, the

17. For example, the "withdrawal" provision of the first agreement, for the latter half of 1963 states (5778A):

> (Withdrawal) Article 7. A party to this agreement wishing to withdraw may withdraw 30 days after he has notified the Council [Television Export Council] to that effect.

Similar or identical withdrawal provisions appear in each of the Manufacturers' Agreements for the following years. (5875A; 6008A; 18391A-456A). Continued participation in the JMEA Rules was likewise voluntary. Those Rules applied only to members of the JMEA, a voluntary association. It is undisputed that no Japanese manufacturer or exporter was required to belong to the JMEA. Non-members of the JMEA were not required to observe the JMEA's internal rules, which were adopted by vote of the members at meetings of the JMEA. Japanese law specifically protects the right of exporters to withdraw from such arrangements by providing expressly by statute that approval of those arrangements can be given only if withdrawal from the agreement is not restricted. Export and Import Trading Act, Act No. 299, 5 August 1952, Section 5-bis, subsection (v).

absence of any sanction for non-compliance, the absence of any formal decree, the absence of any statement of any Japanese legal officer as to the legal effect, if any, of the "direction", the existence of an unexercised legal right to review of any "direction" which if exercised would have resulted in invalidation of any "direction" — a fact at least showing petitioners' lack of *bona fides* in reliance on the alleged "direction"—the fact that MITI's so-called "administrative guidance" is not even a defense to charges under the *Japanese* antimonopoly laws, and defendants' total failure to conform their conduct to the "direction", all combine to deprive the note of any remaining significance whatever.

The Court of Appeals, however, had no occasion to address these other legal and factual issues. The Court below took the note at face value, but held that "summary judgment on that ground is not possible for several reasons" (188a-189a):

> We may assume, without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act. See, e.g., *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). On this record, summary judgment on that ground is not possible for several reasons.
>
> First, we note that NUE and Zenith rely on the minimum price agreements primarily as evidence of a low export price conspiracy. Moreover, it cannot be

said with any degree of certainty that the minimum prices, claimed by the NUE and Zenith experts to be dumping prices, were in fact determined by the Japanese Government. It is possible to conclude that the government merely provided an umbrella under which the defendants gained an exemption from Japanese antitrust law, and fixed their own export prices. Second, there is abundant evidence suggesting that many defendants departed from the agreed-upon minimums and took steps to conceal their departure from MITI. Thirdly, there is no record evidence suggesting that the five-company rule originated with the Japanese Government. Finally, the evidence about price stabilization in the Japanese home market suggests unequivocally that this activity violated the laws of Japan.

Clearly, therefore, a summary judgment in defendants' favor on the defense of sovereign compulsion would be improper.

The factual issues identified by the court are clear, and its decision is correct. Petitioners' actual course of conduct makes their reliance on the note nothing but a sham. *Cf. California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) ("If the end result is unlawful, it matters not that the means used in violation may be lawful").

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962), this Court said that "acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme," as here defendants' allegedly "immune" conduct was made a constituent element in their broader, unlawful scheme. And, as the Court said in *Loewe v. Lawlor*, 208 U.S. 274, 299 (1908), "[t]he most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of

the plot by law." The Court of Appeals correctly held that any significance the note may have can be determined only after reviewing the totality of petitioners' course of conduct — not simply by isolating a single constituent element — particularly where defendants in that single constituent element did not even *comply* with the "direction" they now attempt to hide behind.

For good reason, petitioners deliberately chose not to press this last-ditch issue in the court below. They have not yet even created a record of this purported "sovereign compulsion defense" at a trial. For these reasons and because numerous factual issues are presented by its attempted invocation here before the lower courts have addressed it, interlocutory review would be inappropriate. Final disposition of the legal issues should await the development of a full factual record and the determination of all the legal and factual questions in the lower courts.

III. THE COURT OF APPEALS' INTERLOCUTORY RULING ON THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE UNDER RULE 703 OF THE FEDERAL RULES OF EVIDENCE WAS CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT

The Third Circuit's unanimous determination that the opinions of respondents' economic experts — set forth in over 1,500 pages of reports and affidavits — are admissible was correct. The Third Circuit's application of Rule 703 does not conflict with that of any other circuit.[18]

18. *See American Universal Insurance Co. v. Falzone*, 644 F.2d 65, 66-67 (1st Cir. 1981); *Brink's Inc. v. City of New York*, 717 F.2d 700, 710-712 (2d Cir. 1983); *Seese v. Volkswagenwerk, A.G.*, 648 F.2d 833, 844-845 (3d Cir. 1981), *cert. denied*, 454 U.S. 867 (1981); *Wilder Enterprises, Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1143-1144 (4th Cir. 1980); *Bauman v. Centex Corporation*, 611 F.2d 1115, 1120-21 (5th Cir. 1980); *Mannino v. International Manufacturing Company*, 650 F.2d 846, 851-853 (6th Cir. 1981); *Baumholser v. Amax Coal Co.*, 630 F.2d 550, 552-553 (7th Cir. 1980); *United States v. Hollman*, 541 F.2d 196, 200-201 (8th Cir. 1976); *United States v. Sims*, 514

(101a-105a). The Third Circuit's additional ruling that *properly supported* expert opinion evidence may suffice to demonstrate the existence of factual issues and thus defeat summary judgment (106a) does not conflict with any decision in any other circuit.[19] Review by this Court of these interlocutory evidentiary issues would involve only questions of admissibility of evidence under familiar legal rules, questions of significance only in this case. The petition should accordingly be denied.

Respondents' experts have not yet testified. The rulings below were based on the verified pretrial, written summaries of their opinions which the experts prepared as part of plaintiffs' compliance with the Case Management Order, Pretrial Order No. 154. Petitioners' motions *in limine* never disputed the professional qualifications of respondents' distinguished experts to render these opinions. Petitioners did not assert, nor did the district court find, that respondents' experts selected the data on which they based their opinions in a manner inconsistent with accepted standards. Based largely on petitioners' own discovery responses, the experts determined that petitioners' behavior was *not* consistent with the competitive model, and, moreover, that the best economic explanation of these events was collusion among the petitioners. (100a-101a, 109a-120a, 169a-180a). After its own review of the factual record and the experts' written reports, the

NOTE *(Continued)*

F.2d 147, 149 (9th Cir. 1975), *cert. denied*, 423 U.S. 845 (1975); *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981); *see* also J.B. Weinstein and M.A. Berger, *Weinstein Evidence* ¶703[03]. In the cases petitioners cite, the experts offered only unsupported conclusions.

19. *See Hughes v. American Jawa, Ltd.*, 529 F.2d 21, 24-26 (8th Cir. 1976); *Bieghler v. Kleppe*, 633 F.2d 531, 533-534 (9th Cir. 1980); *California Steel and Tube v. Kaiser Steel Corporation*, 650 F.2d 1001, 1003 (9th Cir. 1981); *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*, 659 F.2d 903, 911-912 n.15 (9th Cir. 1981), *aff'd on other grounds*, 103 S.Ct. 1713 (1983).

Third Circuit agreed. (172a, 174a-175a, 179a). This ruling is not controversial. Courts have long recognized the relevance and value of economic evidence as proof of the existence or non-existence of conspiracy in antitrust cases.[20]

Petitioners presented no expert economic opinion evidence of their own, no evidence to show that the factual data on which respondents' experts relied was *not* of a type customarily relied upon by experts in their fields of expertise (101a-104a), and no economic evidence to show that respondents' experts' opinions lacked sufficient foundation for admissibility. Respondents' experts' *uncontradicted* affidavits and reports established without contradiction, as the Court of Appeals correctly determined, that the materials on which they had relied were of the type customarily and reasonably relied upon by experts in their fields. (102a). Respondents' experts made no unsupported factual assumptions.

The Court of Appeals' pretrial, interlocutory ruling on the admissibility of the expert opinion evidence in this case was correct, involves no conflict and raises no important question warranting further review by this Court.

CONCLUSION

The petition is an improper attempt to induce a piecemeal, pretrial review of the antitrust segment of a case that in any event must go to trial on the individual 1916 Antidumping Act claims not addressed in the petition. In deciding the antitrust issues, the Court of Appeals applied familiar settled principles to a lengthy record of direct and circumstantial evidence unique to the case. No controversial or otherwise certworthy principle of general impor-

20. *See, e.g., Continental Baking Company v. United States*, 281 F.2d 137, 141-146 (6th Cir. 1960); *Standard Industries, Inc. v. Mobil Oil Corporation*, 475 F.2d 220, 227-228 (10th Cir. 1973), *cert. denied*, 414 U.S. 829 (1973); *Ohio Valley Electric Corporation v. General Electric Company*, 244 F.Supp. 914, 930 (S.D.N.Y. 1965).

tance is involved. There is no conflict among the circuits; prior controlling decisions of the Court were fully recognized and correctly applied by the appellate court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: July 6, 1984